Office-Supreme Court, U.S.
FILED
OCT 25 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

LOUIS VANACEK,
Petitioner,

vs.

ST. LOUIS PUBLIC SERVICE COMPANY, a Corporation,
Respondent.

No. 427.

Certiorari to the Supreme Court of Missouri.

PETITIONER'S REPLY BRIEF.

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St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477

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ARGUMENT.

Petitioner respectfully states that Respondent's Brief heretofore filed herein actually presents only two propositions advanced with any color of merit, and that the same are these:

1. That no Federal question was timely raised (R's brief, pp. 2, 3-5).

2. That "petitioner does not com[illegible] within a class which was denied equal protection (R's brief, 2, item '4', and 7, item 'IV')."

We should like to be heard in opposition as follows:

I.

The Federal Question Was Timely Raised Under the Circumstances of This Particular Case.

We recognize a general rule to the effect that a Federal question is raised too late if first raised in a motion for rehearing directed to a final decision and opinion of the highest State Court.

However, this general rule is subject to an exception to the effect that the general rule does not apply "where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right." **Great Northern Railway Co. v. Sunburst Oil and Refining Co.**, 287 U. S. 358, 367, 53 S. Ct. 145, 77 L. Ed. 360.

It was not understood below that the contract between the respondent here and the City of St. Louis did anything more than relieve respondent "of its future, i. e., after abandonment, liability to exercise ordinary care to maintain the street in a reasonably safe condition," and it was understood, at least by the majority of the Commissioners who prepared an opinion for Division One of the Supreme Court of Missouri, that respondent did not contend otherwise (petition herein, pp. 28, 31, 36, 50).

Yet the Court en banc, by its opinion, declared the existence and terms of the said contract to be the determining factor in ruling respondent's cause of action (opinion of Court en banc, petition, pp. 20, 22, 25, 26).

No such view had been held by any judicial body passing on the case before the Supreme Court, en banc, advanced it. Two learned Commissioners of Div. One of the Supreme Court of Missouri stated, in the course of an opinion which they prepared to be the law of this case, that not even respondent contended for any such view (petition, pp. 28, 31, 36, 50).

We think that this should be enough to move this Court to at least inquire further (by way of granting the writ herein sought) into the question of whether or not the Federal question is here seen as timely raised.

II.

Petitioner Was Shown to Be a Member of a Class Denied Due Process of Law (or the Equal Protection of the Laws).

Throughout these proceedings in this Honorable Court, we have leaned most heavily on the opinion written for Division One of the Supreme Court of Missouri by Hon. Cullen Coil, Commissioner, and concurred in by Hon. Lawrence Holman, Commissioner (petition, pp. 31-50).

We have done so not under any theory that anything therein said is binding on this Court as any decision of any Court, but merely because the same constitutes a correct exposition of the law governing this case (in language better than any we could devise or employ), while the opinion of the Missouri court en banc is incorrect, especially with regard to the way in which the latter denies petitioner's Federal constitutional rights by giving effect to a private contract to which he was not a party.

For this reason, we made the whole said opinion of said Hon. Coil part and parcel of our Motion for Rehearing below (petition, p. 28), and we consider every word

and figure thereof therefore properly before this Court for its consideration as an argumentative exposition of what the law is.

On this lack of "class" in petitioner, therefore, we respectfully refer this Court to this language contained in said opinion, found in our petition herein, pp. 34-35:

> "It is undisputed that defendant, prior to the time of its abandonment of service and tracks, had a continuing and nondelegable duty to exercise ordinary care to maintain the portion of the street in question in a reasonably safe condition for the use of the public. Such was defendant's duty both under the common law and by virtue of the St. Louis charter and ordinance above noted. 83 C. J. S., Street Railroads, § 112, p. 229; 55 Am. Jur., Urban Transportation, § 110, p. 108; Burow v. St. Louis Public Service Co., Mo., 100 S. W. 2d 269, 270 [1, 2]. That duty was owed by defendant to every member of the traveling public, including plaintiff. Lowery v. Kansas City, Mo., 85 S. W. 2d 104, 110 [4-7]. Defendant breached that duty by omitting to repair the defect in the street at the time it had the duty to so do and at a time when it reasonably could have foreseen that its failure to perform that duty was likely to result in future injury to members of the traveling public; and if a breach of that duty was a substantial factor in causing injury and damage to plaintiff, Hildreth v. Key, Mo. App., 341 S. W. 2d 601, 607 [12-14], it would appear that a submissible case was made insofar as concerns the contention being here discussed.
>
> It seems apparent that defendant's omission to repair when it had a duty to the public, including plaintiff, to do so, was a substantial factor along with the joint negligence of the city which had the

nondelegable duty to exercise care to maintain its streets in a reasonably safe condition, Fosmire v. Kansas City, Mo., 260 S. W. 2d 252, 254 [2, 3], in causing injury and damage to plaintiff and thus defendant's negligence constituted a legal or proximate cause. Hildreth v. Key, supra. In the circumstances of this case, including the relationship of the parties, i. e., **plaintiff being a member of the class to whom defendant owed the duty to repair at the time it had that duty**, the fact that at the time of the injury defendant no longer had the duty to maintain the street in a reasonably safe condition is of no decisive consequence. Plaintiff relies upon a breach of a duty committed at a time when defendant admittedly had the duty; he does not rely upon any breach of duty after defendant's duty had ceased to exist" (emphasis supplied).

It is again respectfully submitted that this Court ought to grant petitioner the writ he seeks.

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